First Consolidated Sdn Bhd v Padu Ehsan Sdn Bhd (Majlis Perbandaran Melaka Bandaraya Bersejarah, garnishee)

HIGH COURT (MELAKA) — CIVIL SUIT NOS 22–113 OF 1992 AND 22–114 OF 1992
LOW HOP BING J
16 OCTOBER 2003

Civil Procedure *— Judgment — Enforcement of judgment — Application for order fixing time for doing act required by judgment — Rules of the High Court 1980 O 45 r 6*

On 23 November 1995, Suriyadi J ordered that the money garnished by the judgment creditor ('JC') be paid by the garnishee to the JC's solicitors on the latter's undertaking to refund the same in the event that the garnishee's appeal to the Court of Appeal was allowed ('the order for stay of execution'). No date was specified in the order for this purpose. Pursuant to the order for stay of execution, the garnishee paid to the JC's solicitors the sum of money garnished. The garnishee's appeal was subsequently allowed by the Court of Appeal ('the CA order'). In the Court of Appeal, when the garnishee's learned counsel raised the issue pertaining to the refund of the money held by the JC's solicitors, their Lordships stated that the CA order read with the order for stay of execution clearly made it mandatory for the JC's solicitors to refund the money to the garnishee because the garnishee's appeal had been allowed. However, when the garnishee's solicitors made a claim of the money from the JC's solicitors, the latter failed, refused or neglected to refund the same. Since an order was now necessary to specify the time for the JC's solicitors to refund to the garnishee the money held by it as stakeholders, the garnishee applied for, inter alia, an order to specify the time for JC's solicitors to comply with the order for stay of execution and the CA order and for the JC's solicitors to be ordered to comply with the order for stay of execution and the CA order within seven days from the service of the order for stay of execution, the CA order and the order herein.

Held, allowing the garnishee's application:

(1) Under O 45 r 6(l) of the Rules of the High Court 1980 ('RHC'), the court had the power to extend time for doing an act required by a judgment or order. In addition, under O 45 r 6(2) of the RHC, the court had the power to specify the time for an act to be done by a supplemental order where a judgment requiring an act to be done had omitted to specify the time for doing the act and where pursuant to O 42 r 6(2), the judgment or order did not require a time for doing the act to be specified (see pp 764H–765A).

(2) In the instant case, the order for stay of execution did not specify the time for the JC's solicitors to comply therewith. In the circumstances, in exercise of the powers conferred upon the court

under O 45 r 6(2) of the RHC, it was appropriate for the time to be specified within which the JC's solicitors had to comply therewith. Further, the indorsement of the penal notice in Form 87 sought by the garnishee was supported by O 45 r 7(4)(a) of the RHC (see p 765B–C).

[Bahasa Malaysia summary

Pada 23 November 1995, Suriyadi H telah memerintahkan bahawa wang yang digarnis oleh pemiutang penghakiman ('MP') dibayar oleh yang digarnis kepada peguamcara MP atas akujanjinya untuk membayar balik yang sama sekiranya rayuan yang digarnis ke Mahkamah Rayuan dibenarkan ('perintah untuk penggantungan perlaksanaan'). Tiada tarikh ditetapkan dalam perintah untuk tujuan ini. Menurut perintah untuk penggantungan perlaksanaan tersebut, yang digarnis telah membayar kepada peguamcara MP jumlah wang yang digarnis. Rayuan yang digarnis berikutannya telah dibenarkan oleh Mahkamah Rayuan ('perintah MR'). Di Mahkamah Rayuan, apabila peguam bijaksana yang digarnis menimbulkan persoalan berhubung pembayaran balik wang yang dipegang oleh peguamcara MP, Yang Arif hakim-hakim menyatakan bahawa perintah MR dibaca dengan perintah untuk penggantungan perlaksanaan dengan jelas menjadikan ia mandatori untuk peguamcara MP membayar balik wang kepada yang digarnis tersebut kerana rayuan yang digarnis telah dibenarkan. Namun begitu, apabila peguamcara yang digarnis membuat tuntutan wang daripada peguamcara MP, yang mana beliau gagal, enggan atau cuai untuk membayar balik yang sama. Memandangkan satu perintah perlu sekarang untuk menetapkan masa untuk peguamcara MP membayar balik kepada yang digarnis wang yang dipegang olehnya sebagai pemegang amanah harta, yang digarnis memohon untuk, antara lain, satu perintah untuk menetapkan masa untuk peguamcara MP mematuhi perintah untuk penggantungan perlaksanaan dan perintah MR dan untuk peguamcara MP diperintahkan untuk mematuhi perintah untuk penggantungan perlaksanaan dan perintah MR dalam tempoh tujuh hari daripada penyampaian perintah untuk penggantungan perlaksanaan, perintah MR dan perintah ini.

Diputuskan, membenarkan permohonan yang digarnis:

(1) Di bawah A 45 k 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah mempunyai kuasa untuk melanjutkan masa untuk membuat satu tindakan yang dikehendaki oleh satu penghakiman atau perintah. Tambahan pula, di bawah A 45 k 6(2) KMT, mahkamah mempunyai kuasa untuk menetapkan masa untuk satu tindakan dibuat melalui satu perintah tambahan di mana satu penghakiman yang menghendaki satu tindakan telah tertinggal untuk menetapkan masa untuk membuat tindakan tersebut dan di amna menurut A 42 k 6(2), penghakiman atau

perintah tersebut tidak menghendaki satu masa ditetapkan untuk membuat tindakan tersebut (lihat ms 764H–765A).

(2) Dalam kes semasa, perintah untuk penggantungan perlaksanaan tidak menetapkan masa untuk peguamcara MP mematuhinya. Dalam keadaan sedemikian, dalam melaksanakan kuasa yang diberikan ke atas mahkamah di bawah A 45 k 6(2) KMT, ia adalah sesuai untuk masa ditetapkan di dalamnya di mana peguamcara MP dikehendaki mematuhinya. Tambahan pula, pengindorsan notis penal dalam Borang 87 yang dipohon oleh yang digarnis disokong oleh A 45 k 7(4)(a) KMT (lihat ms 765B–C).

Notes

For cases on enforcement of judgments, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3279–3280.

Cases referred to

A Solicitor and Advocate, In Re and In the Matter of Ordinance No 101 [1932] MLJ 177 (distd)
Capital Insurance Bhd v BS Sidhu [1996] 3 MLJ 1 (distd)
DVA & Co [1900] 1 Ch 484 (refd)
Launder, Re [1908] 98 LT 554 (refd)
Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381 (refd)
Seah Choon Chye v Saraswathy Devi [1971] 1 MLJ 112 (distd)
Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Sri Komakmur Sdn Bhd [1998] 5 MLJ 756 (distd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1998] 2 MLJ 217 (distd)

Legislation referred to

Rules of the High Court 1980 O 42 r 6, O 45 rr 6(2), 7(4)(a)

Adillah Ahmad Nordin (*Adillah A Nordin*) for the garnishee.
Yau Jiok Hua (*Yau Jiok Hua & Co*) for the judgment creditor.

Low Hop Bing J:

Application

This is an application in encl (56) filed by the garnishee, for the following orders:

(1) an order to specify the time for the judgment creditor's solicitors ('JC's solicitors') Messrs Yau Jiok Hua & Co. to comply with the High Court order dated 23 November 1995 ('order for stay of execution') and the Court of Appeal order dated 11 March 2002 ('the CA order');

(2) that the JC's solicitors be ordered to comply with the order for stay of execution and the CA order within seven days from the service of the order herein, the order for stay of execution and the CA order (collectively referred to as 'the three orders'), whereby the JC's solicitors shall pay to the garnishee within seven days of the service of the three orders, a sum of RM309,133.45 held by the JC's solicitors as stakeholders on the undertaking by the JC's solicitors to refund to the garnishee in the event the garnishee's appeal is allowed by the Court of Appeal;

(3) that a notice in compliance with O 45 r 7 and Form 87 be indorsed on this order and the order for stay of execution; and

(4) costs of this application be paid by the JC to the garnishee.

Factual background

The factual background which also contains the garnishee's grounds in support of this application may be stated briefly as follows:

(1) On 23 November 1995, Suriyadi J, ordered that the money garnished by the JC shall be paid by the garnishee to the JC's (garnishor's) solicitors on the undertaking by the JC's solicitors to refund the same in the event that the garnishee's appeal is allowed. No date was specified in the order for this purpose.

(2) Pursuant to that order, the garnishee paid to the JC's solicitors a sum of RM309,133.45 (for Civil Suit No 22–113–1992) and RM153,488.02 (for Civil Suit No 22–114–1993) to be held by the JC's solicitors as stakeholders on the undertaking to refund the same to the garnishee in the event that the garnishee's appeal is allowed by the Court of Appeal.

(3) The garnishee's appeal was indeed allowed by the Court of Appeal, pursuant to the CA order. In the Court of Appeal, when the garnishee's learned counsel raised the issue pertaining to the refund of the money held by the JC's solicitors, their Lordships stated that the CA order read with the order for stay of execution clearly made it mandatory for the JC's solicitors to refund the money to the garnishee because the garnishee's appeal has been allowed.

(4) However, when the garnishee's solicitors made a claim of the money from the JC's solicitors, the letter failed, refused or neglected to refund the same.

(5) On 2 January 2003, after the garnishee's solicitors served the CA order on the JC's solicitors, still no refund was made by the JC's solicitors.

(6) An order is now necessary to specify the time for the JC's solicitors to refund to the garnishee the money held by the JC's solicitors as stakeholders on the undertaking to refund the same in the event the garnishee's appeal is allowed.

Submission for garnishee

Cik Adillah Ahmad Nordin, learned counsel for the garnishee, submitted that this application was made under O 45 r 6 of the Rules of the High Court 1980, as the order for stay of execution did not specify the time for the JC's solicitors to comply therewith and also to include a penal notice under O 45 r 7 and in Form 87 in order to enable the garnishee to execute the order in the event the JC's solicitors fail to comply therewith. She relied on *Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Sri Komakmur Sdn Bhd* [1998] 5 MLJ 756.

It was also argued for the garnishee that the JC's solicitors have given an undertaking to refund the money, and cited *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1998] 2 MLJ 217; *In Re A Solicitor and Advocate and In the Matter of Ordinance No 101* [1932] MLJ 177; *Seah Choon Chye v Saraswathy Devi* [1971] 1 MLJ 112.

Contention for JC

Mr Yau Jiok Hua, learned counsel for the JC, contended that the order for stay of execution was not served on the JC's solicitors personally and that the garnishee has forfeited its right to the undertaking mentioned in the order for stay of execution because the garnishee did not fulfil the condition in the order for stay of execution and the payment by the garnishee was not made pursuant to the order for stay of execution. Reliance was placed on *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1.

Decision of the court

Lest the respective counsel for the parties herein missed the wood for the trees, I must immediately emphasize that the application before me is not an application for leave to commence committal proceedings for contempt of court or for substantive committal proceedings.

The application herein is for an order to specify the time for compliance with, and if necessary subsequent execution of, court orders. In the circumstances, I do not see the necessity or advisability of going into the authorities which concern the obtaining of leave to commence committal proceedings for contempt of court or substantive committal proceedings.

Be that as it may, in deference to the enormous efforts exerted by the respective learned counsel, I shall delve into the authorities cited from both sides of the Bar table in order to demonstrate that they are completely irrelevant to the consideration and determination of the application in encl (56).

First, the authorities relied upon by learned counsel for the garnishee.

Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, clearly concerns the plaintiffs application for leave to commit a director of the defendant for failure to comply with an order of the court.

In *Wee Chong Keong*, the Supreme Court was asked to decide on the priority of hearing a substantive notice of motion for contempt of court in encl (27) and an application to set aside an injunction in encl (21).Both those applications do not have the same genesis with that before me. A

The proceedings *In Re A Solicitor and Advocate*, revolved around a motion by the then Singapore Bar Committee for an order that the respondent do show cause why he should not be suspended from practice as an advocate and solicitor and so the issue was vastly different from that before me. B

The application in *Seah Choon Chye*, was by way of an originating summons for an order that a date be fixed by the court within which an undertaking given by the respondent, a solicitor, to the applicant can be completed. The main issue there was whether the application by way of originating motion is proper or whether it should be by way of writ, and so is not even remotely relevant to the issue before me. C

In *Capital Insurance*, cited for the JC, the Court of Appeal had to decide whether the respondent should be cited for contempt of court for allegedly disobeying an order of the Court of Appeal and so the issue was again dissimilar. D

I shall now consider the instant application based on O 45 r 6, which is reproduced as follows:

> 6 Judgment, etc requiring act to be done Order fixing time for doing it (O 45 r 6) E
>
> (1)Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3 rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein. F
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> (2)Where, notwithstanding order 42 rule 6(1), or by reason of Order 42 rule 6(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein. G
>
> (3)An application for an order under this rule must be made by summons and the summons must, notwithstanding anything in Order 62 rule 10, be served on the person required to do the act in question.

From the express provisions contained in O 45 r 6, it is clear to me that under O 45 r 6(1), the court has the power e.g. to extend time for doing an act required by a judgment or order, including an order containing a positive act: *DVA & Co* [1900] 1 Ch 484; *Re Launder* [1908] 98 LT 554. H

In addition, under O 45 r 6(2), the court has the power to specify the time for an act to be done by a supplemental order in two circumstances: I

(i) where a judgment requiring an act to be done has omitted to specify the time for doing the act; and

(ii) where pursuant to O 42 r 6(2), the judgment or order does not require a time for doing the act to be specified e.g. for payment of money to a person.

(see *Malaysian High Court Practice* 1998 Desk Ed MLJ at p 3153)

The order for stay of execution did not specify the time for the JC's solicitors to comply therewith. In the circumstances, in exercise of the powers conferred upon the court under O 45 r 6(2), it is appropriate for the time to be specified, for the JC's solicitors to comply therewith.

The indorsement of the penal notice in Form 87 sought by the garnishee appears to me to be supported by O 45 r 7(4)(a) (relating to service personally on an individual) which merits reproduction as follows:

> 4 There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served:
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> (a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it;

I agree and adopt the following passage in *Malaysian High Court Practice*, at p 3155:

> The service copy of the judgment or order must contain the requisite penal notice in Form 87, warning the person served that if he neglects to obey or disobeys the judgment or order, he will be liable to process of execution for the purpose of compelling him to obey the same. Failure to insert the penal indorsement in the order is fatal to an application for committal: *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381.

The issue of compliance or non-compliance by the JC's solicitor with the orders and the consequences flowing therefrom would only arise after the time for compliance has been specified in the orders, the indorsement of the penal notice has been entered as an integral part of the orders, the prior compliance by the garnishee with the rules governing personal service and indeed all the relevant and requisite rules pertaining to the execution of the orders.

Having carefully considered the respective submissions and in the light of the foregoing grounds, I hold that there are merits in the garnishee's application in encl (56). I therefore make an order in terms thereof.

Garnishee's application allowed.

Reported by Lim Lee Na